IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ''

SAMUEL R. HOCHMAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for granting the Writ	5
Conclusion	11
Appendix	1a
Statute	1a
Order of District Court denying Motions for Judgment of Acquittal	2a
Opinion of the U.S. Court of Appeals	4a
Order Affirming District Court	10a
Order Denying Rehearing	11a

CITATIONS.

CASES.

Doubleday v. New York, 335 U.S. 848	9
Morissette v. U. S., 342 U.S. 246	10
Roth v. U. S., 354 U.S. 476	5, 6, 11
Smith v. California, 361 U.S. 147	6, 7, 8
Thompson v. City of Louisville, 362 U.S. 199	10

CONSTITUTION OF THE UNITED STATES.

Amendment V	2

STATUTES

18 U.S.C. § 1462	2, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

SAMUEL R. HOCHMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of conviction in the United States District Court for the Eastern District of Wisconsin. The conviction was on two counts of a seven count indictment, charging violation of 18 U.S. Code, § 1462, for knowingly taking from a common carrier, books alleged to be obscene.

OPINIONS BELOW.

The opinion of the District Court is reported in ..... F. Supp. ..... The opinion of the Circuit Court of Appeals is reported at 277 F. 2d 631. Both opinions are appended hereto (pp. 2a to 9a).

JURISDICTION.

The judgment of the Court of Appeals was rendered on April 25, 1960. Petition for rehearing was denied on June 7, 1960. On June 30, 1960, Chief Justice Earl Warren extended the time for filing a petition for a writ of certiorari to and including August 5, 1960.

Jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the exclusion of appropriately offered evidence regarding the prevailing literary standards in the community was violative of petitioner's due process under the Fifth Amendment.

2. Whether the relevant evidence in this case on the issue of guilty knowledge was so minimal in character that the jury was reduced to speculation and conjecture in arriving at its verdict of guilty.

3. Whether the publications entitled "Sex Factory" and "Virgins Come High" were in fact obscene.

4. Whether the evidence in this case established the scienter or the *mens rea* requisite for a prosecution of this kind under a Fedefal Statute.

5 Whether the record in this case was entirely lacking in evidence to support any of the charges.

STATUTE INVOLVED.

The Statute involved is 18 U. S. Code § 1462. This statute is set forth in an Appendix (page 1a, *infra.*)

STATEMENT OF THE CASE.

Petitioner was indicted under 18 U. S. Code § 1462. The substance of the indictment charged in seven counts that petitioner, on May 31, 1957, at Milwaukee, Wisconsin, did knowingly take from a common carrier, obscene publications which had been transported in interstate commerce from New York City, New York. Counts Four through Seven were dismissed by the Trial Court, and the petitioner was found guilty as to Count One and Count Three, and not guilty as to Count Two. This petition is taken from the Court of Appeals decision affirming the judgment of conviction.

No issue was presented as to the interstate character of the shipment containing the books, which were the subject matter of Count One and Count Three. No evidence or testimony was introduced by the Government as to the obscenity of the books, other than the books themselves. As to the question of knowledge of the petitioner of the obscene nature of the books, the prosecution's case at trial, rested exclusively upon the testimony of a single witness, Max Padell, the owner and operator of the Padell Book Company, located in New York City.

Padell testified that he first met petitioner in May of 1957, when Petitioner came to purchase some books. He testified that he was a wholesaler of books, dealing in approximately six hundred titles, including books on sports, languages, technical books on chemistry and engineering, on Yogi, Hypnotism, jokes, mysticism and fiction.

Padell further testified that petitioner was in his establishment for thirty minutes, fifteen of which were consumed in conversation with Padell, to establish credit, and that petitioner spent fifteen minutes browsing throughout Padell's establishment, checking titles and "glancing them through." Petitioner ordered from Padell five copies each of twenty titles in Padell's store, and these books were then shipped by Padell to petitioner's novelty shop in Milwaukee, Wisconsin, by interstate carrier, the ABC Freight Forwarding Company, a trucking line. (Tr. 33).

Julian Clark, an agent for the Federal Bureau of Investigation, testified that he and Agent Krieghbaum had the petitioner's place of business at 733 West Wisconsin Avenue, Milwaukee, Wisconsin, under surveillance on May 31, 1957; that the Klein Cartage Company made a delivery to petitioner's store and that a short time after the delivery, he and Agent Krieghbaum entered petitioner's store. (Tr. 11).

Clark further testified that the carton was unopened and that on request, petitioner was fully cooperative and gave permission to the FBI agents to open the carton. Clark testified that petitioner invited a complete search of his premises and that the agents proceeded to conduct such a search, but found nothing of an obscene nature. Clark then gave a receipt to petitioner for the contents of the carton and took the carton. Petitioner gave Clark a written statement of his transaction with Padell.

Clark testified that he examined the contents of the carton, and that it contained five copies each of twenty different books; that most of the books looked alike, and had the same type of cover as the books involved in counts One and Three. (Tr. 19.) Sixty-five of these books were returned to petitioner by the FBI and subsequently sold.

Padell testified that he sold the books which were the subject matter of Count I and Count III all over the country and book-sellers customarily buy these books from title and book jackets only. (Tr. 39)

Petitioner testified to a conversation with Padell in which Padell assured petitioner that none of the books sold by him were illegal in any way. This testimony was uncontradicted by the government witness, Padell. (Tr. 87)

Error is assigned to the failure of the trial court to permit introduction into evidence of the book "Lady Chatterley's Lover", the then current best seller in Milwaukee, and the barring of testimony of a vice-squad officer that the same or similar books were on sale in bookstores and newsstands throughout the city at the time of the alleged offense.

REASONS FOR GRANTING THE WRIT.

Petitioner is a bookseller, operating a small store on the main street in Milwaukee, Wisconsin. He has operated such store for approximately eight years. He is perhaps identical with many thousands of similar booksellers throughout the United States. Petitioner, in common with other thousands of like businessmen, finds himself perplexed and bewildered by the circumstances which have led to a judgment of conviction, resulting in a prison sentence, and a substantial fine.

The Supreme Court in *Roth* v. *U. S.*, 354 U.S. 476, explicitly set down the rule that obscenity was not an utterance protected by the First Amendment. The Court, in that case, also attempted to define in a precise manner, the word "obscene." This definition, it was supposed, would serve as a guidepost to people like petitioner and to help

them avoid the pitfalls inherent in their business. The definition of obscenity, as set down in *Roth* v. *U. S., supra,* envisions an employment by the finder of fact, be it judge or jury, of the application of contemporary community standards. As Justice Frankfurter stated in *Smith* v. *California,* 361 U. S. 147, at Page 165, "It surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards'."

In the case at bar, petitioner attempted to show the "contemporary community standards" of the community in which he was being tried, by the introduction of a book, which at the time of trial, was shown to be the best selling book in the community. The Trial Court ruled that such evidence was inadmissible, and the jury was left with no guide but their own subjective views.

Petitioner attempted to put into evidence testimony of a local law enforcement officer, to the effect that the same, or similar books, which were the subject of the indictment and conviction of petitioner, were being sold openly and extensively in the city of Milwaukee at the time of the alleged offense. This testimony was excluded by the Trial Court, although it was designed to guide the finders of fact in their determination of the contemporary community standard. It was designed, further, to show in the only possible, practical manner the limits of candor

set by contemporary community standards. "The community cannot, where liberty of speech and press are an issue, condemn that which it generally tolerates." Justice Harlan, *Smith* v. *California*, 361 U.S. 147, at Page 174.

The Trial Court's position as to the showing attempted by petitioner is best shown by the following from the Order denying petitioner's motion for a new trial. "The Court does not believe that the testimony of the Milwaukee detective to the effect that the same or similar books were on sale by other persons in Milwaukee is a defense. The fact that other persons are immoral or sell obscene books, or that other persons in the community may be dishonest, negligent, or guilty of any fault which is in question on a trial, does not in the Court's opinion exonerate a defendant from similar charges. The only question before the jury was whether the defendant was guilty as charged. It is immaterial whether other persons were violating any laws, legal or moral, or any ordinances, or were engaged in selling obscene literature." (App. 3a)

The uncontradicted testimony in the instant case, shows that the identical books, the receipt of which petitioner has been found guilty of, were in wide circulation by the wholesaler through the country and were exhibited openly on newsstands and in bookstores in New York, at the time petitioner ordered them. (Tr. 39, 80, 81)

Smith v. *California* again affirms the principle that traffic in obscene literature may be outlawed as a crime. It holds, further, that one cannot be amenable to such a crime without knowledge of the obscenity. The Supreme Court left unanswered the question of how much or how little awareness that a book may be found to be obscene, suffices to establish scienter, or what kind of evidence may

satisfy the how much or how little. It is the answer to precisely this question which makes the Court's granting of this petition so important.

Although the question was not answered in *Smith* v. *California*, dicta of several Justices skirted the periphery of the subject. Mr. Justice Brennan used the following language: "Eye witness testimony of a bookseller's perusal of a book hardly need be a necessary element in proof of his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." Mr. Justice Frankfurter, at Page 161, said, "Obviously, the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously the Court does not hold that a bookseller who insulates himself against knowledge about an offending book, is to be free to maintain an emporium for smut." And again, at Page 162, Mr. Justice Frankfurter: "If, as I assume, the requirement of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book or sufficiently know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance of knowledge about its contents, then I submit, invalidating an obscenity statute because a state dispenses altogether with the requirement of scienter does require some indication of the scope of scienter that is required." Mr. Justice Harlan on Page 172, continues in the same vein. "Proof of scienter may entail no great burden in the case of obviously obscene material; it may, however, become very difficult where the character of the material is more debatable. In my view, then, the scienter question involves considerations of a different order depending on whether a state or a federal statute is involved."

Settlement of the allied questions of the degree of scienter necessary in obscenity cases, and the type of *mens rea* requisite for a prosecution under a Federal Statute, is plainly in the public interest, since it is likely to be presented in every obscenity prosecution, including many now pending. More important, perhaps, is the undeniable fact that because of the uncertainties now existing in the field of obscenity, the free dissemination of constitutionally protected expression is, as a practical matter, seriously restricted.

Since the present definition of obscenity embodies "community standards", publications may be found to be not obscene in one area and obscene in another. To give only a few examples: Edmund Wilson's "Memoirs of Hecate County" was found obscene in New York, *Doubleday* v. *New York*, 335 U.S. 848; a bookseller indicted for selling the same book was acquitted in California. "God's Little Acre" was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania. It is precisely because of this uncertainty in the treatment of books in different areas that justice demands that the scope of scienter be spelled out with more certainty than presently exists.

In the case at bar, petitioner ordered books from a price list, and from book jackets. Before purchasing said books he ascertained that the identical books were on sale throughout the community. He purchased said books upon the representation and assurance of the seller that they were legal in all respects. A finding that petitioner examined said books in any fashion whatsoever other than to ascertain that said books were in the stock of the bookseller, is conjectural and speculative, since no testimony in the record is to that effect. The factual situation, therefore, is reduced to the circumstances of a book-

seller being convicted under 18 U.S. Code §1462 for ordering books which a jury ultimately finds to be obscene. The transaction was open and above board, there was no attempt at any time to conceal the transaction or the books involved therein; the books were shipped on interstate carrier in the normal business fashion. There was no denial, but an avowal, of the receiving of such books. The entire conduct of petitioner in relation to said books and in his actions of and toward the Government agents raises a strong presumption that there was no knowledge of the obscene character of the books, and nothing in the Government testimony rebuts such a presumption. *Morissette* v. *U. S.*, 342 U.S. 246, at Page 274.

The issue of whether the books in question were obscene or non-obscene was argued strenuously in the trial court. The decision as to obscenity was left to the jury, who, because of the exclusion of appropriately offered testimony through duly qualified witnesses regarding the prevailing literary standards and the exclusion of the literary and moral criteria by which books relevantly comparable to the books in controversy are deemed not obscene, had no standards other than purely subjective ones. Such exclusion of testimony violated petitioner's "due process."

Two major points were argued before the appellate court. One, that the verdict was based on speculation, conjecture and suspicion, and that the record made in the District Court was one "that was entirely lacking in evidence to support any of the charges." *Thompson* v. *City of Louisville*, 362 U.S. 199. The second error urged before the Court of Appeals was that the jury's finding of obscenity could not stand because of the errors of the Trial Court in refusing to allow petitioner to acquaint the jury with contemporary community standards. Obscenity of the publications was not conceded before the Court of

Appeals, non-obscenity was simply not argued. The issue of obscenity or non-obscenity was one for the jury, and the evidentiary rules of the Trial Court made it impossible for the jury to rule on the publications in a manner consistent with the definitions as set down by the Supreme Court in *Roth* v. *U.S.*, *supra*.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX.

STATUTE INVOLVED.

18 U. S. C. Sec. 1462:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with an express company or other common carrier, for carriage in interstate or foreign commerce . . .

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for indecent or immoral use; or any written or printed card, letter, circular, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned for not more than five years, or both." As amended May 27, 1950, c. 214, Sec. 1, 64 Stat. 194.

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

UNITED STATES OF AMERICA, *Plaintiff*, v. SAMUEL R. HOCHMAN, *Defendant.*	}	No. 57-CR-96

ORDER DENYING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL OR FOR A NEW TRIAL.

The defendant was found guilty by a jury of two out of three counts in an Indictment charging that he "knowingly" took from a common carrier copies of obscene publications transported in interstate commerce from New York City, New York, to Milwaukee, Wisconsin, in violation of Title 18, Section 1462, United States Code of Laws. In Count I the publication was called "The Sex Factory," and in Count III, the other count of which the defendant was found guilty, it was called "Virgins Come High."

The defendant has made a motion for judgment of acquittal based principally upon the contention that there is no substantial evidence upon which the jury might find that the defendant "knowingly" received obscene literature.

The question of "intent" and the question of "knowingly" must of necessity reside principally in the mind of any defendant. These matters can seldom be established by direct evidence. The court is of the opinion that there is substantial circumstantial evidence from which the jury could conclude that the defendant "knowingly" received the "literature" in question.

Among other things, the jury could consider the defendant's education, he being a college graduate. The defendant was also experienced in book purchasing and in the book selling business. The defendant examined books in retail stores in New York. He personally selected the books from the shelves of a wholesale book store in New

York City. The jury could believe that he at least thumbed through the books. The jury might have considered that the titles and the illustrations in the books are such as to put an intelligent and experienced person on notice of the type of books which they were. A jury could also consider the fact that the price on the book entitled "The Sex Factory" was $3.00, whereas ordinary paper covered thin "books" such as this sold at news counters in the neighborhood of 25 cents. This is a matter of common knowledge. The jury might well have considered that the additional price was based upon something such as that there was a hazard in the business of transporting, owning, and selling such "literature."

The motion for acquittal is hereby denied.

The defendant has also moved for a new trial on the basis of evidentiary rulings. The court does not believe that the testimony of the Milwaukee detective to the effect that the same or similar books were on sale by other persons in Milwaukee is a defense. The fact that other persons are immoral or sell obscene books, or that other persons in the community may be dishonest, negligent, or guilty of any fault which is in question on a trial, does not in the court's opinion exonerate a defendant from similar charges. The only question before the jury was whether the defendant was guilty as charged. It is immaterial whether other persons were violating any laws, legal or moral, or any ordinances, or were engaged in selling obscene literature.

The motion for a new trial is hereby denied.

Dated at Milwaukee, Wisconsin, this 9th day of September, 1959.

K. P. Grubb
U. S. District Judge

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12858 SEPTEMBER TERM, 1959—APRIL SESSION, 1960

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. SAMUEL R. HOCHMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Wisconsin.

April 25, 1960

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In the district court, Samuel R. Hochman, defendant, was found guilty by the verdict of a jury of a violation of 18 U.S.C.A. § 1462, as charged in counts I and III of an indictment, and judgment was entered for his imprisonment and a fine of $1,000. He was found not guilty on count II.

Count I charged that defendant on or about May 13, 1957 at the city of Milwaukee, in the eastern district of Wisconsin, "did knowingly take from a common carrier, to-wit, the ABC Freight Forwarding Company, Milwaukee, Wisconsin, five (5) copies of an obscene publication called "The Sex Factory" by H. Tennob, which were transported in interstate commerce from New York City, New York, to Milwaukee, Wisconsin * * *." In count III the same charge was made as to a publication called "Virgins Come High".

On this appeal, the errors assigned by defendant relate to the alleged failure of the government's proof to establish that the defendant *knowingly* took two books (ex-

hibits 1 and 3) from a common carrier, and to the exclusion of certain evidence.

Exhibits 1 and 3 are books bearing the titles "The Sex Factory" and "Virgins Come High". Defendant's counsel upon oral argument in this court admitted for the purpose of this case that these two books are obscene.

Chronologically arranged, the following facts appeared at the trial:

Defendant operated a novelty and book business at 733 West Wisconsin avenue, in Milwaukee. He is a university graduate. In accordance with custom, a salesman for the Padell Book Shop in New York City called on defendant and attempted to sell him books by showing covers torn off books. At that time he did not buy any books, but the salesman left his price list which defendant looked over. In May, 1957, defendant went to New York and, while there, he went to the Padell Book Shop and talked to Padell, to whom he gave his credit references. Padell told him to look around, and defendant, from a list that he had already made out, marked down on an order the books that he wanted. He already knew what he was going to buy. The books he ordered were shipped to him and received May 31, 1957 about 3 P.M., when he signed a receipt therefor. Defendant states that

> "at about 15 minutes after the deliveryman left the shipment on the floor, three gentlemen came in and introduced themselves at FBI men, saying that they were informed that I was receiving an obscene book, 'The Sex Factory'. With my permission they opened the carton. It contained 101 books. The men took the entire carton of books. They returned 65 or 66 of the books, 13 titles and I saw them. Some of these 13 titles that were returned looked even worse than 'The Sex Factory' and 'Virgins Come High'."

Defendant testified he had never read these two books.

Max Padell, a witness for the government, testified that on the occasion of defendant's visit in May, 1957, he let defendant select his own books. Padell could see Hochman

checking the titles of the books for about 15 minutes. He was checking by glancing through them. Defendant riffled the pages, although Padell did not actually see him read the books.

Julian Clark, an FBI agent, testified that the carton when opened in defendant's store was found to contain books with 20 different titles.[1]

18 U.S.C.A. § 1462 provides: "Whoever * * * knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce—

> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;
>
> * * *
>
> (c) * * * or
>
> Whoever knowingly takes from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

It is defendant's contention that, even if the two books are regarded as obscene, he did not knowingly take the same from the express company, and, therefore, the judgment should be reversed and he should be discharged. The meaning of this contention is narrowed by his attorney's admission, for the purpose of this case, that the books are obscene. Moreover, it is not denied that these books were a part of a shipment moving in interstate commerce, that delivery was made of the carton and its contents to him and that he accepted said delivery. As we understand the

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[1] "Silk Stockings," "Lash," "Flossie," "Spankee," "Straps," "Sadist," "Woman and Her Master," "*Virgins Come High*," "*Sex Factory*," "Celesti," "Wheel of Violence," "Come-on Girl," "Justine," "French Pornographer," "History of Prostitution," "Bandit in High Heels," "Mistress in Satin," "Exotique #13," "Exotique #14," and "Bubbles Darlene."

contention of defendant's counsel about lack of knowledge, it is that defendant did not know that the two books "Sex Factory" and "Virgins Come High" were, as a matter of fact, obscene. We are not convinced by this contention. These books were among those selected by him before he went to New York City and they were scrutinized by him in the Padell Book Shop to the extent that he wished to inspect them. Whether it was a cursory examination, or whether it was more thorough, it was such an examination as satisfied him that he was buying pornographic merchandise which he could sell at a big profit. Defendant testified that these books, which were of the soft paperback variety, printed upon a cheap stock of paper, he bought at $1.50 and intended to sell at $3 each. Not only are the books admittedly obscene, but they are so blatantly so that their obscenity screams forth from the picture on the cover; and others interspersed through the interior of the books, and the pornography in the printed language in page after page is so overwhelming that it is incredible that defendant did not know what he was buying. At least, we cannot say that the jury was not justified in drawing a reasonable inference that defendant knew the obscene nature of these books when he bought them and had them delivered to his store.

The district court refused to permit defendant to introduce evidence to show that books similar to those involved in this case were being sold openly in the city of Milwaukee and that a book entitled "Lady Chatterley's Lover" was the best seller in Milwaukee at the time of the trial. Counsel says that this evidence was designed to show contemporary community standards.

The trial court did not err in its rulings in this respect. Obscenity of the publications here involved having been admitted in this court for the purpose of this case, the existence of these alleged standards of obscenity is irrelevant.

For the reasons herein set forth, the judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, *Chief Judge, concurring.* Defendant's concession, during oral argument, that for the purpose of this appeal it may be admitted that the two books under scrutiny (Exhibits 1 and 3) were obscene, serves to eliminate the issue of "contemporary community standards." With commendable candor counsel announced that this was done in order not to obscure the primary question of the element of *scienter*. In this context we do not treat this concession as one of guilty knowledge on the part of defendant within the terms of 18 U.S.C.A. § 1462.

We are left, therefore, with the important question of whether defendant, at the time he took these obscene books from the carrier in interstate commerce, *knew* that the books were obscene. As in all cases involving guilty knowledge, the determination of a person's state of mind under a given set of circumstances is a difficult and closed question. We are here neither dealing with the validity of a statute or an ordinance,[1] nor are we concerned with determining the character of the subject matter of the publications in question.[2] We are passing on a question of sufficiency of evidence to take a case to a jury for its determination of the issue of intent.

It is well settled that jury verdicts cannot be based on surmise and speculation; that conjecture and suspicion cannot take over where proof fails, and that verdicts based upon such nebulous grounds cannot be permitted to stand. These principles need no supporting citations. The question then arises whether the relevant evidence in this case on the issue of guilty knowledge is so minimal in character that we must say the jury was reduced to speculation and conjecture in arriving at its verdict of guilt.

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[1] *Smith* v. *California*, 361 U.S. 147 (1959); *Roth* v. *United States*, 354 U.S. 476 (1957).

[2] *Rosen* v. *United States*, 161 U.S. 29 (1896); *United States* v. *Padell*, 2 Cir., 262 F. 2d 357 (1958), cert. denied, 359 U.S. 942.

In *Padell*, the court aptly refers to such literary trash as "dreary pornography."

The applicable rule is stated by the Supreme Court of the United States in *Morissette v. United States*, 342 U.S. 246 (1952), where (at page 274) Mr. Justice Jackson stated: "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." In that case the Court reversed a conviction because the trial court invaded the province of the jury through erroneous instructions on this issue.

In the case at bar, it is significant that defendant makes no charge that the jury was improperly instructed. Indeed, an examination of the instructions given by the trial court on the issue of intent demonstrates that the jury was fully and correctly instructed on this question.

A review of the record in this case, "taking the view most favorable to the Government," satisfies me that there was sufficient testimony from which the jury might properly conclude that defendant was aware of the contents of the books. *Glasser v. United States*, 315 U.S. 60, 80 (1942). The fact that the question of proof might have been close and that the jury could have determined it in favor of defendant, as it did on Count II, is only indicative that the evidence was of such character as to require its evaluation by the jury. It is not our appellate function to substitute our judgment for that of the jury under such circumstances.

We are not presented with a record here "that is entirely lacking in evidence to support any of the charges," as was determined by the Supreme Court in *Thompson v. City of Louisville*, ... U.S. ..... (March 21, 1960).

We are concerned neither with a constitutional question of censorship nor with the power of the Government to define obscenity. Within the limited scope of our review of the narrow factual question before us, I agree with the majority opinion that the judgment of the district court must be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, April 25, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SAMUEL R. HOCHMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Wisconsin Division
No. 12858	

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the Opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, June 7, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SAMUEL R. HOCHMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Wisconsin Division

No. 12858

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

FILE COPY

No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAMUEL R. HOCHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Conclusion	7

CITATIONS

Statute:

18 U.S.C. 1462 2

Cases:

Grell v. *United States*, 112 F. 2d 861 6
Lloyd v. *United States*, 226 F. 2d 9 6
Roth v. *United States*, 354 U.S. 476 5
Saunders v. *Lowry*, 58 F. 2d 158 6
Smith v. *California*, 361 U.S. 147 ..... 5, 6
United States v. *Kaye*, 251 F. 2d 87, certiorari denied 356 U.S. 919 6

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 296

SAMUEL R. HOCHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinions of the court of appeals (Pet. 4a-9a) are reported at 277 F. 2d 631. The opinion of the district court (Pet. 2a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1960 (Pet. 10a). A petition for a rehearing was denied on June 7, 1960 (Pet. 11a). An order by the Chief Justice extended the time for filing

a petition for a writ of certiorari to and including August 5, 1960. The petition was filed on August 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, in a prosecution for knowingly receiving obscene books, properly excluded evidence as to certain other books, alleged to be similar, being sold to the public.

2. Whether the evidence supports the jury's finding that the petitioner knew the books were obscene.

STATEMENT

The petitioner was charged in count I of an indictment returned in the United States District Court for the Eastern District of Wisconsin with knowingly taking from a common carrier five copies of an obscene publication called "The Sex Factory," which had been transported in interstate commerce from New York City to Milwaukee in violation of 18 U.S.C. 1462 (R. 7). Counts II and III charged similar violations as to publications called "Presenting Bubbles Darlene" and "Virgins Come High" (R. 7-8). The jury found petitioner guilty on counts I and III, and not guilty on count II (Tr. 185).[1] The court imposed a general sentence on both counts of imprisonment for one and one-half years and a $1,000 fine (R. 64). On appeal (R. 70) the conviction was affirmed (Pet. 4a-10a).

[1] "Tr." refers to the transcript of the trial proceedings.

The evidence introduced at the trial may be summarized as follows:

1. The petitioner operated a novelty and book store in Milwaukee, Wisconsin (Tr. 75-76). A salesman from the Padell Book Company of New York called upon and left with the petitioner some book covers and a price list (Tr. 77-78). In May, 1957, the petitioner went to New York to purchase books from Padell (Tr. 27-28, 79). The petitioner was in the store about half an hour (Tr. 28, 35). Mr. Padell testified that petitioner was checking the titles of books for about fifteen or twenty minutes and "[g]lancing them through" (Tr. 29-30, 36). The petitioner riffled the pages of the books, but Mr. Padell did not see him reading them (Tr. 37-38). The petitioner gave a list of the books he wanted to Mr. Padell, who had them shipped to Milwaukee (Tr. 32-34).

On May 31, 1957, the shipment of the ordered books was delivered to the petitioner (Tr. 21-23). F.B.I. agents had the petitioner's place of business under surveillance, and entered a few minutes after delivery of the books (Tr. 10-11). The petitioner admitted having received the shipment, and gave the agents permission to examine the unopened carton (Tr. 11, 87-89). They found 101 publications comprising about 20 different titles, among which were copies of "The Sex Factory" (count I) and "Virgins Come High" (count III) (Tr. 11-12, 89). Several months later the agents returned about 65 of the books which the petitioner sold (Tr. 89-90).

The petitioner testified that Mr. Padell said that in his 30 years in the book business he had not had any

trouble, and that the petitioner would not have to "be afraid of [the books purchased] as far as the law is concerned" (Tr. 86-87). The petitioner stated that he paid $1.50 per copy for "The Sex Factory" and "Virgins Come High", and his retail price was to be $3 each (Tr. 93-94). He testified that prior to the date of the trial he had not read either of these books (Tr. 90-91).

2. The petitioner attempted to introduce in evidence a copy of "Lady Chatterley's Lover", which was on the best seller list in Milwaukee in August, 1959, at the time of the trial (Tr. 113). The theory was that current best sellers show the contemporary community standards regarding obscenity (Tr. 106-108). The court sustained the prosecution's objection that the indictment referred to 1957, so that it was immaterial that "Lady Chatterley's Lover" was a best seller in 1959 (Tr. 113-114). The petitioner did, however, show that "Peyton Place" was a best seller in May, 1957, the time of the offenses charged (Tr. 114-115). The court permitted defense counsel to read excerpts from this novel describing a number of sexual acts, as an aid to the jury in judging the standards of the community (Tr. 111, 123-139).

The petitioner offered to show by the testimony of a vice squad officer that during 1957 books similar to defendant's Exhibits 11 and 12[2] containing nude

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[2] Defendant's Exhibits 11 and 12 had been purchased from newsstands during the trial, and had been excluded on the ground that they were not addressed to the period in the indictment, and that the court was not trying the question as to whether these exhibits were obscene (Tr. 120-123).

photographs had been sold at all newsstands and had been left untouched by the police since they were regarded as art studies and not obscene. The court, in excluding this evidence, stated:

> We are not trying a Milwaukee city ordinance; we are trying the question of whether a Federal statute has been violated by shipping in interstate commerce obscene literature. If it be true that obscene literature is sold in Milwaukee and the Vice Squad is doing nothing about it, that has nothing to do with this case [Tr. 141-142].

ARGUMENT

1. The petitioner contends (Pet. 6-7) that the court deprived him of his right to show literary "contemporary community standards" under *Roth* v. *United States*, 354 U.S. 476, and *Smith* v. *California*, 361 U.S. 147, by excluding from evidence the novel "Lady Chatterley's Lover," and a police officer's proffered testimony that books similar to the petitioner's were being openly sold at Milwaukee newsstands (Statement, *supra*, pp. 4-5). The court of appeals found it unnecessary to consider the issue in view of the fact that in that court, no attack was made on the validity of the conclusion that the books are obscene.[3] Assuming that the issue is properly here, there was no error in the court's rulings. As to "Lady Chatterley's Lover," the court excluded the evidence on the ground that its circulation in 1959 was too remote for the evidence to have probative

[3] The petitioner states that obscenity was not conceded; it was simply not argued. (Pet. 10-11.)

value as relating to books received in 1957. Cf. *United States* v. *Kaye*, 251 F. 2d 87, 90 (C.A. 2), certiorari denied, 356 U.S. 919; *Lloyd* v. *United States*, 226 F. 2d 9, 17-18 (C.A. 5). The court did permit defense counsel to endeavor to show contemporary standards regarding literature dealing with sex, by reading a number of passages from the novel, "Peyton Place," shown to have been a best seller at the time of the offenses charged (Tr. 111, 114-115, 123-139).

As to the evidence that books like those received by the petitioner were being sold on the newsstands, the court was clearly correct in ruling that the fact that others were selling similar materials, whether in violation of municipal obscenity ordinances or not, was not a defense available to the petitioner. Cf. *Grell* v. *United States*, 112 F. 2d 861, 875 (C.A. 8); *Saunders* v. *Lowry*, 58 F. 2d 158, 159 (C.A. 5).

2. The jury was fully justified in finding, under the court's instructions (Tr. 169, 171-172, 180-181), that the petitioner knew the books were obscene.

It was not necessary that the prosecution produce evidence that the petitioner was seen reading the books. As Mr. Justice Brennan observed in *Smith* v. *California*, 361 U.S. 147, 154: "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." Here the jury could draw the reasonable inference from the attendant circumstances that the petitioner was aware of the

contents of the books. The court below noted that the obscenity "screams forth from the picture on the cover" (Pet. 7a). In view of that fact, the petitioner's glancing through the books and riffling the pages were sufficient to warrant an inference as to his knowledge. And the jury could well believe, as did the trial court, that the high $3 price for the paper books "was based upon something such as that there was a hazard in the business of transporting, owning, and selling such 'literature'" (Pet. 3a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1960.

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SAMUEL R. HOCHMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Petition for Rehearing	1
Reasons Granting Rehearing and Issuing the Writ	1
Conclusion	6
Certificate of Counsel	7

CITATIONS.

CASES.

Kingsley International Pictures Corp. v. Regents, 360 U.S. 684	2, 3
Mapp v. Ohio, 166 N.E. 2nd 387	6
One, Inc., v. Oleson, 355 U.S. 371	3
People v. Richmond County News, Inc., 205 N.Y.S. 2nd 94	4
Roth v. U. S., 354 U.C. 476	2, 3
Smith v. California, 361 U.S. 147	6
Sunshine Book Co. v. Summerfield, 355 U.S. 372	3

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant a rehearing of its Order of October 10, 1960, denying the petition for writ of certiorari, ... U.S. ....., and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case, as prayed for in the petition filed August 4, 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

No legal determination as to the obscenity or non-obscenity of the books in issue has ever been made, either in the Trial Court, or in the Appellate Court. In the Trial Court, the issue was presented to the jury, but because of the evidentiary rulings of the Trial Court, the jury had no standards by which to judge the books, other

than purely subjective ones. The Court of Appeals declined to consider the issue of obscenity of the publications, and also declined to rule upon the claimed errors in the rulings of the Trial Court relating to the exclusion of testimony and evidence designed to guide the jury in their determination of the contemporary community standards.

Petitioner contends and strongly urges the Court that upon the issue of obscenity of the books involved herein, petitioner has not had his "day in Court." Mr. Justice Harlan, in *Roth* v. *U.S.*, 354 U.S. 476, at Pages 497, 498, stated:

> "The suppression of a particular writing or other tangible form of expression is an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing Court must determine for itself whether the attacked expression is suppressible within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.
>
> "I do not think that reviewing Courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as 'obscene' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind."

In *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 at 696, Justice Frankfurter stated: "We cannot escape such instance-by-instance, case-by-case application of that clause in all the varieties of situations

that come before this Court", and Mr. Justice Harlan, in the same case, at Page 708, spoke of " . . . the necessity for individualized adjudication. In the very nature of things the problems in this area are ones of individual cases. . . ."

It should be noted that the Court, in *One, Inc.*, v. *Oleson*, decided January 13, 1958, 355 U.S. 371, and *Sunshine Book Co.* v. *Summerfield*, decided the same day, 355 U.S. 372, apparently followed this principal in summarily reversing the lower Court on the authority of *Roth* v. *U.S.*, *Supra*.

The exclusion by the Trial Court of the proffered testimony of the local Vice-Squad Officer that the same or similar books which were the subject of the indictment and conviction of petitioner, were being sold openly and extensively in the City of Milwaukee at the time of the alleged offense, denied to the jury an essential guide-post in the determination of the contemporary community standard and, therefore, affected their determination of obscenity or non-obscenity of the publications.

Petitioner contends that the theory of the Trial Court in excluding the Vice-Squad Officer's testimony was clearly erroneous. To illustrate, at Page 145 of the transcript, the Court said:

> "Well, on that theory, if there is gambling going on fairly openly in the community, a man can just walk in a gambling den and participate and say he didn't know there was anything wrong about it; or he can go in an immoral house. 'Why, other people are doing it. I don't see anything wrong about it.' It is doing it in the open."

It is evident that the Trial Court treated such testimony in the nature of a defense, rather than for the purpose

for which it was introduced. The fallacy of the Court's logic lies in the fact that whereas actions cited by the Court are illegal *per se*, buying or receiving books in interstate commerce is not an illegal act in itself. Gambling is illegal; prostitution is illegal; speeding is illegal; adultery is illegal; no amount of official laxity in enforcing the statutes or ordinances making such conduct illegal can be an excuse or defense for one charged with such crimes. Bookbuying, however, is not illegal *per se*; only the buying of *obscene* books is illegal. If books are sold openly and extensively, a presumption exists that such books are not obscene, and any judicial determination as to their obscenity must take into account the fact of their locally wide circulation as a factor in determining contemporary community standard.

It is contended that titles and covers of publications, although suggestive, do not make such publications obscene. In a very recent case, *People v. Richmond County News, Inc.*, 205 N.Y.S. 2nd 94, decided July 11, 1960, holding that the mere showing that a magazine distributing corporation was aware of a magazine cover and title is not sufficient proof of scienter to justify conviction, the Court said: "Such external displays and title do not necessarily invite further inquiry or investigation; they constitute an inadequate basis on which to impute knowledge . . . of the contents of the magazine."

This is the predicament facing booksellers throughout the country: A Book is ordered, or offered for sale by publisher, bearing a provocative cover and title. Bookseller reads the book to satisfy himself as to its legitimacy for re-sale to the public. The bookseller, after reading said book, determines that it is not obscene, but being a careful and prudent man, makes a survey of other booksellers in his own city and elsewhere. This investigation

discloses that the identical book is and has been on sale everywhere for several years, and no problems of any nature have arisen concerning said book. The bookseller proceeds a step further, and consults the publisher as to the nature and character of said book and specifically inquires as to whether there has been any problem anywhere in connection with said book. The publisher, who has been in business, troublefree, for 30 years, assures the bookseller that the book has been sold for years throughout the country and, no problems have arisen. Bookseller thereupon purchases said book for re-sale and finds himself subject to an indictment and prison term for receiving said book.

What yardstick can the bookseller use to determine what he may or may not order and sell. If the book is what is classed as "hard core pornography" there is naturally no problem. But, if the book is in the nature of thousands of similar books sold on newsstands and in bookstores throughout the country, what rule can guide this bookseller. That is the dilemma which faces book sellers generally and the petitioner particularly. The uncontroverted testimony discloses that the identical books, the receipt of which has subjected him to 18 months imprisonment, were on sale extensively throughout the city in which he did business and generally throughout the country. That they had been sold openly for several years and petitioner received assurance of the publisher that no problems in relation to said books had or could arise. It is also undisputed that the covers and the prices of said books were identical to 65 other books which were originally seized by the F.B.I. and subsequently returned to petitioner for re-sale. It seems to petitioner to be axiomatic that testimony of law enforcement officers of the

existence of the factors stated above to be clearly admissable to show the contemporary community standards and scienter. "The community cannot, where liberty of speech and press are an issue, condemn that which it generally tolerates." Justice Harlan, *Smith* v. *California*, 361 U.S. 147, at Page 174.

Since this Court denied petitioner's petition for certiorari on October 10, 1960, certiorari was granted in the case of *Mapp* v. *Ohio*, 166 N.E. 2nd 387. This latter case contains questions of scienter which are similar to the case at bar, and it is hoped that the determination in *Mapp* v. *Ohio* may have a bearing upon the issues presented herein.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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